In the Supreme Court of the United States

OCTOBER TERM, 1973

No. 73-174

JOHN A. MONDAY, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINIONS BELOW

The memorandum opinion and order for judgment of the district court (Pet. App. 8-14) is reported at 342 F. Supp. 1271. The opinion of the court of appeals (Pet. App. 1-7) is not yet officially reported.

JURISDICTION

The judgment of the court of appeals was entered on May 4, 1973 (Pet. App. 1). A petition for rehearing was denied on June 4, 1973 (Pet. App. 15). The petition for a writ of certiorari was filed on July 25, 1973. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTION PRESENTED

Whether the district court correctly denied petitioner's motion to strike an exhibit, one of the documents of

which contained a clerical error, and to dismiss the complaint because of such error.

STATUTES INVOLVED

The pertinent provisions of Sections 6202 and 6203 of the Internal Revenue Code of 1954 are set forth at Pet. App. 2-3.

STATEMENT

In June 1968, a jury verdict was returned finding that petitioner was a person responsible for collecting and paying over taxes withheld from the wages of employees of the P. C. Monday Tea Company during the third and fourth quarters of 1960 under Section 6671 of the Internal Revenue Code of 1954. The jury also found that his failure to do so was not willful under Section 6672 of the Code.

The court of appeals reversed, holding that the jury had been improperly instructed on the question of willfulness, and remanded with instructions to enter judgment for the United States against petitioner because the evidence of petitioner's willfulness was so conclusive that a contrary verdict could not stand. *Monday* v. *United States*, 421 F. 2d 1210 (C.A. 7), certiorari denied, 400 U.S. 821. The court of appeals denied rehearing but directed that judgment against petitioner not be entered until the district court had considered certain matters not in issue here.[1] (Pet. App. 1-7.)

After the mandate of the court of appeals issued, petitioner filed a motion in the district court to strike

---

[1] The issues concerned (1) the administrative practice for collection of penalties from responsible officers, and (2) the computation of petitioner's liability (Pet. App. 2).

Exhibit 19, which had been introduced into evidence at the trial, and to dismiss the complaint. The ground of petitioner's motion was that one of the documents of the exhibit recited that the assessment related to the third and fourth quarters of 1964 although in fact the assessment related to the third and fourth quarters of 1960.

The three documents contained in Exhibit 19 were as follows (Pet. App. 3):

1. The district director's blue certificate stating that he had compared the attached copy of the original assessment certificate with the original assessment certificate relating to the third and fourth quarters of 1964 and that it was a true copy thereof.

2. A copy of the Form 23C assessment certificate dated October 16, 1964.

3. A copy of the certificate of assessments and payments of John A. Monday reflecting liability for the third and fourth quarters of 1960 and certified by the district director to be a true and complete statement.

Because of the discrepancy between the blue certificate (Document No. 1) which referred to the year 1964, and the assessment certificate (Document No. 3) and the complaint which both referred to the year 1960, petitioner contended that the exhibit should have been stricken. Petitioner further urged that the discrepancy between the two documents was jurisdictional and required dismissal of the complaint (Pet. App. 2-3).

The district court denied petitioner's motions and, in accordance with the remand instruction of the court of appeals, entered judgment against petitioner (Pet. App. 8-14). The issue with respect to Exhibit 19 was raised by petitioner for the first time in this case after the

remand by the court of appeals.[2] Because of the limited scope of the remand order, the district court held that petitioner could not then object to the introduction of an exhibit at the first trial (Pet. App. 9-10). Nevertheless, the district court noted that the motions were without substantive merit (Pet. App. 10-11). On petitioner's appeal from that adverse judgment, the court of appeals affirmed (Pet. App. 1-7).

ARGUMENT

The sole issue raised by petitioner is whether the district court correctly denied petitioner's motion to strike Exhibit 19 and to dismiss the complaint. Not only did the limited mandate of the court of appeals, in connection with the original remand of the case, preclude consideration of that issue but, as both courts below stated, the argument is without merit.

Petitioner's argument, at most, establishes clerical error which has not been shown to have prejudiced him.[3] The motion to strike the exhibit was grounded upon the recital on the blue certificate (Document No. 1) that the period covered by the assessment certificate (Document No. 2) was the third and fourth quarters of 1964. In actuality, the third and fourth quarters of 1960 were

---

[2] Petitioner did not argue against the introduction of Exhibit 19 either during the initial (Government's) appeal to the Seventh Circuit or in his first petition for a writ of certiorari.

[3] The cases petitioner cites (Pet. 8) are inapplicable and do not provide the conflict of decisions alleged (Pet. 6). *United States* v. *Coson*, 286 F. 2d 453 (C.A. 9), involved the validity of a lien and not an assessment. *Gallion* v. *United States*, 389 F. 2d 522 (C.A. 5), held that the taxpayer could not bring a refund suit more than two years after notice of disallowance of his claim for refund had been mailed. *Brafman* v. *United States*, 834 F. 2d 863 (C.A. 5), while holding an assessment invalid, did so because the assessment was unsigned.

involved. As both the district court (Pet. App. 11) and the court of appeals (Pet. App. 3-4) recognized, the recital in Document No. 1 was an obvious clerical error. It should have recited that the period covered by the assessment certificate (Document No. 2) was the third and fourth quarters of 1960. The fact that the 1964 date was a clerical error is made clear in the certificate of assessments and payments (Document No. 3), which indicates that petitioner's liability was for the third and fourth quarters of 1960.

Petitioner has not alleged that he had not been assessed for the correct period, but merely that there was a discrepancy between the date in the complaint and the date on the document certifying the authenticity of the assessment certificate. He does not show that this discrepancy prejudiced him. The case presents no issue warranting review by this Court.

CONCLUSION

For the reasons stated, it is respectfully submitted that the petition for a writ of certiorari should be denied.

ROBERT H. BORK,
Solicitor General.
SCOTT P. CRAMPTON,
Assistant Attorney General.
BENNET N. HOLLANDER,
WILLIAM M. BROWN,
Attorneys.

SEPTEMBER 1973.

DOJ-1973-09